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FOREWORD: LAW, PSYCHOLOGY, AND THE EMOTIONS

HEIDI LI FELDMAN*

Given that law is made by and for people, the relatively little attention lawyers, judges, and legal scholars have paid to human psychology is surprising.¹ Too often, legal writers have either presupposed or borrowed impoverished conceptions of human nature, erecting legal theories for people presumptively possessed of the requisite nature, regardless of the psychology of the actual persons who make and live under the law. Even when they do attend to human nature, legal scholars tend to ignore the centrality of emotions, dispositions, fantasies, and wishes to human psychology. The articles in this Symposium are united by their authors' resistance to unrealistic or incomplete theories of human nature. Whether they rely on developed social science or more speculative theories of the mind, or a combination of the two, each author portrays human actors in complex psychological terms and discusses the implications for law, legal theory, moral theory, or some combination of these. After reading the collection of articles presented here, the reader will, I hope, see how scholars, lawyers, judges, and policymakers can work toward law that comprehends and accepts the complexity of human psychology.

Ever since the advent of American legal realism, some legal scholars have incorporated psychological theory into their arguments.² The most famous representative of this strand of legal realism, Jerome Frank, looked somewhat naïve when he attempted to diagnose judicial and scholarly tendencies toward formalism by using a (very) roughly Freudian analysis according to which American legal

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1. Let me stress the adjective "relatively" right from the outset. Particularly in the area of jury research, there is excellent legal scholarship incorporating the methods of psychology. See, e.g., REID HASTIE ET AL., *INSIDE THE JURY* 230 (1983); Vicki L. Smith, *How Jurors Make Decisions: The Value of Trial Innovations*, in *JURY TRIAL INNOVATIONS* (G. Thomas Munsterman et al. eds., 1997); Phoebe C. Ellsworth, *Are Twelve Heads Better Than One?*, 52 L. & Contemp. Probs. 205, 218-23 (1989); Joel D. Lieberman & Bruce D. Sales, *What Social Science Teaches Us About the Jury Instruction Process*, 3 PSYCHOL. PUB. POL'Y. & L. 589 (1997).

2. See generally JEROME FRANK, *LAW AND THE MODERN MIND* (1930).

actors, yearning for a father-figure, tried instead to substitute determinate legal analysis based on doctrinal categories.³ Frank's effort displays a peril for lawyers turning their attention toward psychology: the human subject is complex and psychology itself is a dynamic discipline; lawyers and legal scholars must beware of overgeneralizing from psychological theories and findings. Frank's approach, however, is refreshing because he at least attends to human nature, and how it might affect how we think about and make law. For much of American history, neither judges nor legal scholars—two major purveyors of legal texts—devoted explicit attention to the question of human nature.

When “classical legal thought” dominated American law, legal scholarship reflected the formalist, doctrinal orientation of the judicial opinions of that period. Both judges and legal scholars formulated taxonomic categories based on previous legal precedents and then applied these categories, without much explanation or interpretation, to resolve new disputes. Classical legal thinkers did not explore the ways in which human nature influenced the construction of the taxonomies they drew. Indeed, to the extent that they perceived law to be like natural science, they regarded the taxonomies as given independently of human nature. Neither the attitudes nor values of either the lawmaker or the citizenry mattered to legal categories, which existed in a quasi-Platonic dimension, discoverable through the careful study of prior cases.⁴

Not that classical legal thinkers operated without a background conception of human nature. To the extent that classical legal

3. According to Frank, law was resistant to the disenchantment that had empowered modern science “[b]ecause in law, the father is more deeply entrenched. The law is a near substitute for that father, a belief in whose infallibility is essential to the very life of the child.” *Id.*, reprinted in AMERICAN LEGAL REALISM 209 (William Fisher III et al. eds., 1993). Frank endorsed the idea of law as a form of social engineering and thought that judges and lawyers who freed themselves from a feeling of constraint due to precedent would achieve “the modern mind.” *Id.*, reprinted in AMERICAN LEGAL REALISM, *supra*, at 210-11.

Modern civilization demands a mind free of father-governance. To remain father-governed in adult years is peculiarly *the* modern sin. . . . And law, if it is to meet the needs of modern civilization must adapt itself to the modern mind. It must cease to embody a philosophy opposed to change. It must become avowedly pragmatic. . . . Until we become thoroughly cognizant of, and cease to be controlled by, the image of the father hidden away in the authority of the law, we shall not reach that first step in the civilized administration of justice, the recognition that man is not made for the law, but that the law is made by and for men.

Id., reprinted in AMERICAN LEGAL REALISM, *supra*, at 211. Morton Horwitz argues that *Law and the Modern Mind* should be remembered for its criticisms of formalism and its recognition of contingency and uncertainty rather than “its bold and simplistic psychoanalytic strokes.” MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960, at 176 (1992).

4. See HORWITZ, *supra* note 3, at 11-19.

thinkers shared a political orientation, it was libertarian, committed to a rather minimal state that left as much scope as possible for citizens to exercise their individual liberty in the marketplace, where they could bargain, contract, and exchange. Libertarianism, like other political philosophies, has at least an implicit conception of human nature, as evidenced by its commitments to ownership and exchange, the activities it takes to be distinctively human and centrally important to human welfare. A world of owners, producers, and consumers is different than a world of, say, hedonists, thrill-seekers, and adventurers; or a world of saints, ascetics, and dreamers. What matters to these different personalities varies, and so should the law, insofar as it seeks to promote what matters to the people it serves.

Although legal realists sought to unmask the ideological assumptions of classical legal thought, they did not expressly question its implicit vision of personhood. Subsequent critical legal scholarship—especially feminist legal scholarship and critical race studies—has questioned the dominant conception of the person implicit in law and mainstream legal scholarship, particularly the way in which lawyers and legal scholars tend to take white men as representative of all legal actors.⁵ But by and large, critical legal scholarship has not focused on the political and moral psychologies implicit in the work it criticizes,⁶ nor has it developed an alternative scheme.

Legal realism's other intellectual heir, the law and economics movement, suffers from an impoverishment similar to classical legal thought. Rather than start by exploring actual human psychology, law and economics traditionally assumed a particular human nature, that of the expected utility maximizer. Certainly, law and economics scholars have been far more self-conscious in adopting a theory of

5. See, e.g., Mari Matsuda, *Foreword: McCarthyism, the Internment and the Contradictions of Power*, 40 B.C. L. REV. 9 (1998) (discussing how constitutional law and analysis looks from the Japanese-American perspective rather than the dominant white perspective, particularly in light of the internment experience of Japanese-Americans during World War II); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988) (criticizing conventional jurisprudence for its assumption that human beings are necessarily always bodily distinct from one another, since this does not hold for women); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (arguing for the different experience and meaning of rights for blacks and whites, and arguing that critical legal studies' critiques of rights assume the white perspective).

6. But see Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (using Freudian theory and cognitive psychology to argue for the pervasiveness of unconscious racism and for the need for judges to take it into account when performing equal protection analyses).

human nature than were classical legal writers, but still they have assumed, not explored, what actual people are like. Some law and economics writers have begun to take account of how real people differ from the economic model. Even these scholars, however, continue to view the model as regulative for law, counting differences between actual psychology and the model's as deviations—consequences that the law should redress.

For the authors in this Symposium, human nature is not something to be simplified, idealized, or reshaped by the law. Instead, the authors urge careful attention to the reality of how human beings think and feel. None of the authors conceives of the law as equivalent to social science or philosophy, but each draws upon ideas and findings from one or both of these fields to develop a textured understanding of how human beings think and act—of who we are.

In *Prudence, Benevolence, and Negligence: Virtue Ethics and Tort Law*, I explore the role that character plays in the substantive law of negligence and that cognition plays in its application.⁷ I argue that the reasonable person standard should be understood as a thought-experiment apparatus, best operated by laypeople, who can use it to generate normative expectations based on the conduct of a person possessed of reasonableness, prudence, and due care for the safety of others.⁸ I concentrate on the role of prudence and due care in the construction of negligence law's delineation of its role model because these roles define a particular evaluative perspective. Depending upon one's character traits, one cares more or less about certain aspects of the world, and these concerns dispose one to take some actions and resist others. When a court instructs a jury to compare the conduct of a reasonable, ordinarily prudent, duly careful person to that of the defendant to decide whether the defendant acted negligently, the jury must apply the evaluative perspective defined by the traits of prudence and due care and imagine how a person with this perspective on the world would act. Performing this thought experiment requires cognitive skills, particularly the ability to predict the conduct of a fictional character possessed of specific virtues and lacking certain other traits. My Article draws upon theories from the philosophy of mind to suggest how jurors might perform this task.

7. Heidi Li Feldman, *Prudence, Benevolence, and Negligence: Virtue Ethics and Tort Law*, 74 CHI.-KENT L. REV. 1431 (2000).

8. *Id.* at 1433.

In *Empathy and Evaluative Inquiry*, Justin D'Arms delves deeply into the connections among emotions, evaluative thought, and our ability and tendency to identify emotionally with others.⁹ D'Arms, a moral philosopher, utilizes the philosophical tradition of moral psychology, an area that increasingly intersects with philosophy of mind, philosophy of science, and epistemology, to make his point. D'Arms investigates how empathy helps us acquire knowledge about what issues are significant to us and why. He argues that we can learn from contagiously "catching" other people's emotional reactions—that emotion can be a source of knowledge about value, as opposed to a distortion of good judgment.¹⁰ For lawyers, judges, and policymakers, such knowledge about value is essential. Without understanding what human beings justifiably care about, the law cannot protect what does and should matter to us.

Elizabeth Rapaport's Article, *Retribution and Redemption in the Operation of Executive Clemency*, further illustrates this point.¹¹ Rapaport argues that executive clemency is a justified response to the personal redemption that prisoners sometimes undergo, particularly when they are incarcerated for long periods of time.¹² According to Rapaport, an executive's emotional response to a prisoner's transformation can justify granting clemency.¹³ She believes that an executive's empathy with the prisoner may attune the executive to values not previously recognized or fully understood, e.g., the value of personal transformation achieved in difficult circumstances. This may lead the executive (and the rest of us) to see authentic worth in granting the prisoner clemency.

Of all the writers in this Symposium, Jeffrey J. Rachlinski (the only trained social scientist of the group, holding a doctorate in psychology and a law degree) most clearly accepts law as a tool for social engineering.¹⁴ But Rachlinski expresses skepticism toward lawyers and legal scholars who too readily rely on social scientific theory or findings to underwrite consequentialist policy recommendations.¹⁵ While sympathetic to the idea "that social norms influence

9. Justin D'Arms, *Empathy and Evaluative Inquiry*, 74 CHI.-KENT L. REV. 1467 (2000).

10. *Id.* at 1483, 1498.

11. Elizabeth Rapaport, *Retribution and Redemption in the Operation of Executive Clemency*, 74 CHI.-KENT L. REV. 1501 (2000).

12. *Id.* at 1514.

13. *Id.* at 1535-36.

14. Jeffrey J. Rachlinski, *The Limits of Social Norms*, 74 CHI.-KENT L. REV. 1537 (2000).

15. *Id.* at 1539.

behavior in ways that policymakers can use,” Rachlinski cautions against reducing social norms to vehicles of reward and punishment.¹⁶ He further questions the assumption that the law can easily manipulate existing social norms or create new ones to alter the effect of social norms on individual calculations of expected utility.¹⁷ Rachlinski urges behavioral law and economics scholars and law and social norms scholars to turn from rational choice theory and game theory to sociology and social psychology for robust empirical information about how human beings develop and respond to social norms.¹⁸ He provides some excellent examples of how findings in social psychology complicate the relationships between law, social norms, and human action.¹⁹

Donald C. Langevoort’s contribution exemplifies how the study of human psychological tendencies can influence the way lawyers perform, and even define, their jobs.²⁰ In *Taking Myths Seriously: An Essay for Lawyers*, Langevoort discusses the phenomenon of personal myth creation and offers reflections on its implication for the relationship between business lawyers and their clients. Langevoort introduces the problem of “individual sense-making” created by our need to navigate the world, our quite incomplete information about it, and our limited ability to process the information available to us.²¹ Through a variety of psychological mechanisms, Langevoort discusses how people answer to their need to make sense of themselves, other people, and their environments, without allowing themselves to fully appreciate how much their sense-making depends on guesswork. According to Langevoort, appreciating both our need for sense-making and our overconfidence in the way that we make sense of the world matters to lawyers because “lawyers are involved in so much difficult inference and decision-making in their own professional lives and the lives of their clients.”²² Langevoort concludes that lawyers will be better advisers and communicators if they understand the role of personal myths in their clients’—and their own—constructions of the world.

16. *Id.*

17. *Id.*

18. *Id.* at 1541.

19. *See id.*

20. Donald C. Langevoort, *Taking Myths Seriously: An Essay for Lawyers*, 74 CHI.-KENT L. REV. 1569, 1586 (2000).

21. *Id.* at 1572-77.

22. *Id.* at 1571.

In *The Hidden Economy of the Unconscious*, Anne C. Dailey argues for the application of psychoanalysis to the law.²³ Whereas Langevoort focuses on cognitive mechanisms that fulfill our psychological need to order our environments and our role in them, Dailey urges that lawyers should attend to the source of our needs, feelings, and motives, many of which are unconscious, irrational, or both.²⁴ In Dailey's view, psychoanalytic theory reminds lawyers, legal scholars, and policymakers that we are not merely better or worse information-processors, but rather bearers of emotional energy that stems from our unconscious.²⁵ Interestingly, Dailey claims that law unduly focused on cognitive psychology will undervalue deep self-reflection and personal expression, and the political and social conditions these require.²⁶ If, as Freudian theory teaches, we cannot attain genuine autonomy without comprehending our own inner psychologies, lawmakers interested in human liberty must consider how the legal system encourages or discourages self-reflection and expression that can lead to a better understanding of our own motives, desires, and values.

The articles in this Symposium belong to a nascent movement in legal and philosophical scholarship, a movement marked by suspicion of oversimplification of human nature and underappreciation of the role that emotion plays in human life. The symposium contributors further this movement by utilizing theories of mind and substantive findings about human psychology in careful, contextual ways. They do not lock onto a particular movement in psychology or philosophy and assign it exclusive explanatory power or exclusive relevance to law. Nor are these authors unthinkingly essentialist about human nature. None presumes that human beings think, feel, or act alike in every context. Instead, the authors rely on fine-grained information and ideas about human subjectivity to explore the implications of that subjectivity for law and the related fields of ethics and epistemology. As a group, the articles in this *Symposium on Law, Psychology, and the Emotions* demonstrate that legal scholars and scholars in related fields can use psychological and philosophical theories of human mind and human nature unprogrammatically, nondogmatically, and nonideologically. Taken together, their work demonstrates how

23. Anne C. Dailey, *The Hidden Economy of the Unconscious*, 74 CHI.-KENT L. REV. 1599 (2000).

24. *Id.* at 1606-07.

25. *Id.* at 1620.

26. *Id.* at 1606.

empirically informed conceptions of human nature can enhance our understanding of how law is made and how it should be made, of what law is and what it should be.